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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

MOTION OF GULF OIL CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

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THE COURT PRESS, N. Y. C.

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unemployment system fostered by the Federal Social Security Act; in other words, such an application of the New York law would constitute an infringement of the congressional regulation of interstate and foreign commerce inherent in the exclusion of such employees from the national, and consequently from the intended coterminous state, unemployment insurance scheme 8

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STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

Motion for Leave to File Brief as *Amicus Curiae*.

May It Please the Court:

Upon the annexed consent of all real parties in interest in this case, the undersigned, as counsel for Gulf Oil Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*.

MATTHEW S. GIBSON,
Counsel for Gulf Oil Corporation
as *Amicus Curiae*.

Consent to File Brief as *Amicus Curiae*.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
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FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

It is hereby consented that Gulf Oil Corporation may file and serve herein a brief as *Amicus Curiae*, it being stipulated and agreed as a part of this consent that the appellee Frieda S. Miller may, and the parties respectfully move this Honorable Court that she may, have a reasonable time thereafter within which to file and serve a brief in answer to said brief of Gulf Oil Corporation.

Dated, New York, New York, May 10, 1943.

(sg) CLETUS KEATING,
Counsel for Appellant.

(sg) ORRIN JUDD,
Solicitor General of the State
of New York,
Counsel for Appellee, Frieda S. Miller.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

BRIEF OF GULF OIL CORPORATION AS *AMICUS CURIAE.*

Statement.

Gulf Oil Corporation operates many vessels which enter the State of New York, and the General Manager of its Marine Department has his office in New York. Its home office and principal place of business is in Pittsburgh, Pennsylvania and it has branch offices of its Marine Department in several states.

Facts.

The brief for the appellant gives a satisfactory statement of the facts. We wish to emphasize the turmoil into which the accounts and business of ship owners such as Gulf Oil Corporation will be thrown, and the additional burdens and discriminations that will be imposed upon them, if this Court affirms the decision below. New York's Unemployment Insurance Law has the broadest extra-territorial effect. If the place from which the service of a seaman of a vessel on the navigable waters of the United States is "directed or controlled" is held by the New York State Department of Labor to be in New York, or if the "base of operations" is held to be in New York, then his employer must make the contributions to the state unemployment insurance fund on his wages, not just for the service he may have performed, in New York, but for his "entire service", including that performed without the state (Appellant's Brief, p. 47). This is true even though he works only one day in New York and the rest of the time on the high seas or in another state.

Vessels plying the inland waterways and those in the coastwise trade may pass through many states. Some states have unemployment insurance laws that apply to an employee's entire wages if he works more than half the time in such states. If the services of seamen on such vessels are directed from a place in New York, and they perform some services in that state, the employer might well be subjected to multiple, and, hence, discriminatory taxation, besides the burden of keeping track of the number of hours each seaman works in each state. A voyage from New

York to Boston through Long Island Sound, for example, passes through New York, Connecticut, Rhode Island, and Massachusetts. The Court will take judicial notice of the fact that stops at intermediate points in the different states, for the purpose of taking on and discharging cargo or making repairs, would render the vessel operator's burden of complying with the different unemployment insurance laws intolerable. Each state has different rules, regulations, and forms. Some have the "merit" system, while others have not adopted it. And the rates differ. States with laws similar to New York's might reasonably claim that the "base of operations" was not in New York but in such other states. Two or three states might reasonably claim the tax on the entire services of a seaman for the same period by asserting that either the "base of operations" or the place from which the service is "directed or controlled" is in each state. For example, the ship's agent might be in one state, the manager of the company in another, and the home office in a third state. Each might, with apparent propriety, claim the tax on the seaman's entire wages, if he worked any time in such state. In fact such multiple taxation was actually imposed upon the appellant in *International Elevating Co.* v. *Miller*, No. 723, Oct. Term 1942, a companion case now before this court (See appellant's reply brief therein).

A perusal of the charts comparing the different state unemployment insurance laws, set forth in the C. C. H. Unemployment Insurance Service, paragraphs 989-994-A, would have dispelled the notion of Finch, *J.*, in the Court below, that the difficulties described above are unreal and imaginary. Moreover, his notion that these difficulties were "conjured up" was expressly predicated on an erroneous state-

ment of the extra-territorial coverage of the Unemployment Insurance Law of New York; for the provision on which he based such notion was to the effect that the law "is applicable only when the whole or the greater part of the contract of employment is performed within this state," and that provision was deleted from the statute in 1941 (Appellant's Brief, p. 47) and is now no longer in the law. There is no provision for apportioning the tax to that part of the interstate and foreign commerce activities which are carried on in New York. Even if there were such apportionment the administrative burdens outlined above would not be lightened,—rather would they be increased.

Argument.

Such confusion and burdens and discriminations as those shown above must have been in the minds of the members of the National Legislature when they excluded officers and members of the crews of vessels on the navigable waters of the United States from the coverage of the Federal Unemployment Tax Act. Certainly the framers of the Constitution had such considerations in mind when they gave Congress exclusive and plenary power to regulate interstate and foreign commerce (Article 1, Section 8, Clause 3) and extended the judicial power of the United States to "all cases of admiralty and maritime jurisdiction".

We subscribe to the treatment of this problem as presented in Appellant's Brief. Our purpose here is to present the matter in a different light and to make certain points which we think appellant omitted for the sake of brevity.

POINT I.

Regulation such as that being attempted here by the State of New York is inherently a subject of national, and not of local, concern, and is therefore a subject that demands uniformity of regulation; and this attempt by the State so to regulate the employment of seamen would be an altogether inadmissible regulation of interstate and foreign commerce, even in the absence of the federal action in excluding seamen from the coverage of the federal act, for the reason that the Constitution itself occupies this field. (Art. 6, Cl. 2 (Supreme Law); Art. 1, Sec. 8, Cl. 3 (Commerce Clause); Art. 3, Sec. 2 (Maritime Jurisdiction).)

Henderson v. *Mayor of New York,* 92 U. S. 259, 273-275 (1876);
People v. *Compagnie Generale Transatlantique,* 107 U. S. 59, 63 (1883);

and cases cited in Appellant's Brief.

POINT II.

Congress has occupied this particular field of interstate and foreign commerce to the exclusion of this state tax and regulation. (Art. 6, Cl. 2 (Supreme Law); Art. 1, Sec. 8, Cl. 3 (Commerce Clause); Art. 3, Sec. 2 (Maritime Jurisdiction) of the Federal Constitution.)

This argument is apposite only in those cases where the states *may act* in the absence of federal legisla-

tion, but where there has been federal action covering the same field. It is usually not adopted by the Court when (as we maintain is the case here) the subject is clearly one of national as opposed to local concern (Point I above). *Kelly* v. *Washington*, 302 U. S. 1, 14, 15 (1937), and cases there cited.

But the two points are not mutually exclusive: this is both a subject of national concern and one that has been comprehensively regulated by Congress, as the brief of the appellant so aptly demonstrates. In this respect this case is parallel to *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63 (1883).

POINT III.

The application of the New York Unemployment Compensation Law to employers of officers and members of crews of vessels on the navigable waters of the United States is in direct conflict with and would wholly frustrate the express regulation of Congress, which, acting within its province in the exercise of its plenary and exclusive power to regulate interstate and foreign commerce, has adopted the national policy of keeping this class of employers, for the time being, outside the scope of the nationwide unemployment system fostered by the Federal Social Security Act; in other words, such an application of the New York law would constitute an infringement of the congressional regulation of interstate and foreign commerce inherent in the exclusion of such employees from the national, and consequently from the intended coterminous state, unemployment insurance scheme. (Art. 6, Cl. 2 (Supreme Law); Art. 1, Sec.

8, Cl. 3 (Commerce Clause); Art. 3, Sec. 2 (Maritime Jurisdiction); Art. 1, Sec. 8, Cl. 18 (General Power) of the Federal Constitution.)

The arguments (1) that this is a subject of national character and (2) that Congress has occupied this field to the exclusion of this local tax and regulation (Points I and II, above) would ordinarily presuppose the absence of a direct conflict between this local law and any Congressional regulation; but we respectfully maintain that not only is this a field of national concern, which has been completely occupied and regulated by the Congress, but also that the state tax and regulation here attempted would obviously nullify an express regulation by the Congress. *McGoldrick* v. *Gulf Oil Corporation,* 309 U. S. 414, 428, 429 (1940), and cases cited. There, Congress, in the exercise of its commerce power, had exempted the subject matter from its tax regulation. The same is true here. In that case there was no express prohibition of a like tax regulation by the states. But this Court held that such prohibition was necessarily implied because Congress's express exemption amounted to a regulation and evidenced its clear intention that the subject be left unregulated and unburdened by the states.

See SALES TAXES, INTERSTATE TRADE BARRIERS, AND CONGRESS: THE GULF OIL CASE, by M. R. Schlesinger, 39 Michigan Law Review No. 5, March, 1941, pages 755, 779, 780, 781.

In this case there is an implied but none the less positive Congressional prohibition against the state tax regulation here involved. Such prohibition is inherent in the whole Federal-State unemployment

insurance system, since, as appellant points out, the intention of Congress was that the state and federal acts be coterminous in scope. *Buckstaff Co.* v. *McKinley,* 308 U. S. 358, appellant's brief, pages 37, 38.

We respectfully maintain, to paraphrase a statement in the dissenting opinion in *McCarrol* v. *Dixie Greyhound Lines, Inc.,* 309 U. S. 176 (1940), that Congress, unconfined by the "narrow scope of judicial proceedings", has found, in the exercise of its plenary constitutional control over interstate and foreign commerce, that to bring seamen into the special Federal-State statutory system of unemployment insurance would not be consistent with the best interests of our national economy, and, on the basis of a full exploration of all aspects of the problem, has devised a national policy excluding seamen from such system. For New York to bring them back into the system would contravene this indubitable intention of Congress, and would therefore be contrary to the supreme law of the land.

The federal permission to bring interstate and foreign commerce activities within the scope of state unemployment insurance acts (Appellant's Brief, p. 39) applies to bus and truck drivers, telegraph and telephone operators, freight forwarders, traveling salesmen who take interstate orders, and the like; but the one field of interstate and foreign commerce not embraced within such permission is that of *maritime employment,*—for it is expressly excluded from the term "employment" by the federal act. (Section 1607 of the Federal Act, Appellant's Brief, p. 55). The act does not define "unemployment"; but obviously it means lacking the "employment" as defined in the act. So, the federal act, in setting up the

system and forcing it upon all forty-eight states by economic pressure, and in referring to state laws as "unemployment" insurance laws, intended such term to mean lack of the "employment" defined in the federal act. It was clearly the intention of Congress that all states should adopt such system and that each state should provide the same coverage, or at least not go beyond the coverage of the federal act, in order to prevent inequalities among the states, which might induce migration of industry or of workers. And the uniform or maximum coverage intended by Congress could only be that provided by the federal act itself.

POINT IV.

In this case the state is wrongfully endeavoring to change retroactively a contemporaneous and long-continued executive construction of the apparently ambiguous unemployment insurance statute to the detriment of employers who acted in reliance thereon for several years, during which time the legislature has amended the law in other respects and has thereby adopted such construction; and the Social Security Board has adopted it by giving its approval to the law as so construed.

See pages 14 and 15 of appellant's brief for reference to an opinion rendered by the Attorney General of New York in 1936, to the effect that officers and members of crews of vessels are not covered by the New York law (L. 1935, Ch. 468).

Davis v. *Manry* (1925), 266 U. S. 401, 45 S. Ct. 163, 69 L. Ed. 350;

United States v. *Cerecedo Hermanos y Compania,* 209 U. S. 337;

United States v. *Alabama Great Southern Railroad Co.,* 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134 (1892);

Griswold's "A Summary of the Regulations Problem", 54 Harv. L. Rev. 398;

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Waterbury Savings Bank v. *Danaher* (1941) 128 Conn. 78, 20 A. 2d 455;

Hadden v. *South Carolina Tax Commission,* 190 S. E. 249, 253, 183 S. C. 38 (1937);

State v. *Equitable Life Assur. Soc.,* 282 N. W. 411, 68 N. D. 641;

Massachusetts Protective Assn. v. *United States,* 114 F. 2d 304, 313, 314 (C. C. A. 1st, Aug. 6, 1940);

Commissioner of Internal Revenue v. *Monarch Life Ins. Co.,* 114 F. 2d 314, 323 (C. C. A. 1st Aug. 15, 1940);

Armitage v. *B'd of Education of City of Auburn,* 203 N. Y. S. 325, 122 Misc. 586, Affd. 205 N. Y. S. 910, 210 App. Div. 812, affd. 148 N. E. 699, 240 N. Y. 548;

Duke Power Co. v. *South Carolina Tax Commission,* 81 Fed. 2d 513, 520;

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United States v. *Chicago, St. P. M. & O. Ry. Co.* (C. C. A. 8th, 1930), 43 F. (2d) 300, 305-306, 71 A. L. R. 507.

This is not a simple isolated question of the proper construction to be placed upon a state statute. It is inextricably interwoven with and colored by the intention of Congress in setting up the Federal-State unemployment insurance system and defining the scope thereof.

The Social Security Board, which has always had the power to withdraw its approval of the New York Unemployment Insurance Law, and thereby to prevent New York employers from receiving credit of up to 90% of the federal tax for the contributions under the New York law (Internal Revenue Code, Sections 1603 and 1601), should be presumed to have had knowledge of the above contemporaneous and long-continued executive construction of the New York law by the chief law officer of the state; and the Board should be presumed to have approved such construction by continuing to approve the law as so construed since 1936.

One of the conditions of the Board's approval of a state act is that "*All* money withdrawn from the unemployment fund of the State shall be used solely in the payment of *unemployment* compensation * * *" (Emphasis ours. Internal Revenue Code, Section 1603 (a) (4)) "Unemployment" under that provision certainly means lack of the "employment" as defined and limited by Section 1607 of the Code. Since the service performed as an officer or member of the crew of a vessel on the navigable waters of the United States is not "employment" as so defined, a loss of such service by the employee is not the "unemployment" mentioned in Section 1603 (a) (4), and, hence, it would seem that payments to such masters or members of crews cannot be made from the unemployment fund of the state lodged with the Secretary of the

Treasury under Section 1603 (a) (3). And it woul seem that a state law requiring, or, as here, construe to require, such payments cannot properly be ap proved by the Board under the above provisions. result of such disapproval would be that credit shoul be denied to all New York employers under Sectio 1601. To avoid such incongruous result and confor to the principle of the cases cited above, the origina construction by the Attorney General should b adhered to by this court for the reasons stated in thi and in appellant's brief.

CONCLUSION.

The decision and order of the Court of Appea should be reversed.

Respectfully submitted,

MATTHEW S. GIBSON,
Counsel for Gulf Oil Corporatio
Amicus Curiae

Dated May 12, 1943.